FILED
JUL 7 - 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-1523

IN THE
Supreme Court Of The United States

DERRICK TODD LEE,
Petitioner,
v.
STATE OF LOUISIANA,
Respondent.

On Petition for a Writ of Certiorari to the Louisiana Court of Appeal, First Circuit

BRIEF OF *AMICUS CURIAE* THE HOUSTON INSTITUTE FOR RACE AND JUSTICE IN SUPPORT OF PETITIONER

TIMOTHY P. O'TOOLE
Counsel of Record
KEVIN G. MOSLEY
MILLER & CHEVALIER, CHARTERED
655 Fifteenth St., N.W.
Suite 900
Washington, D.C. 20005
(202) 626-5800

July 7, 2008

TABLE OF CONTENTS

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

A. Empirical Research Has Shown That Juries Required to Act Unanimously are More Thorough than Non-Unanimous Juries 6

B. Valid Minority Opinions Can Be Easily Marginalized when Unanimity is not Required 10

C. The Myth of the Eccentric Holdout Juror 16

D. The Court's Decisions In Apodaca and Johnson Undermine A Critical Portion of the Jury Trial Guarantee And Make This Court's Intervention Imperative 19

CONCLUSION 20

TABLE OF AUTHORITIES

CASES

Apodaca v. Oregon,
406 U.S. 404 (1972) ..... *passim*

Apprendi v. New Jersey,
530 U.S. 466 (2000) 2, 3

Ballew v. Georgia,
435 U.S. 223 (1978) 15

Batson v. Kentucky,
476 U.S. 79 (1986) 13

Brown vs. Bd. of Educ.,
347 U.S. 483 (1954) 1

Crawford v. Washington,
541 U.S. 36 (2004) 2, 3

J.E.B. v. Ala. ex rel. T.B.,
511 U.S. 127 (1994) 15

Johnson v. Louisiana,
406 U.S. 366 (1972) ..... *passim*

Miller-El v. Dretke,
544 U.S. 660 (2005) 15

Smith v. Texas,
311 U.S. 128 (1940) 15

Snyder v. La.,
128 S. Ct. 1203 (2008) 15

Strauder v. West Virginia,
100 U.S. 303 (1880) 12

Taylor v. Louisiana,
419 U.S. 522 (1975) 12

United States v. Gonzalez-Lopez,
548 U.S. 140 (2006) 2, 3

MISCELLANEOUS

Constitutional Convention of the State of Louisiana, Official Journal of the Proceedings of the Constitutional Convention of the State of Louisiana 380-81 (H.J. Hearsey, 1898) 13

Dennis J. Devine, *et al.*, *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 Psych., Pub. Pol. & L. 622 (2001) .....*passim*

Shari Seidman Diamond, Mary B. Rose & Beth Murphy, *Revisiting the Unanimity Requirement: The behavior of the non-unanimous civil jury*, 100 Nw. U. L. Rev. 201 (2006) .....*passim*

Reid Hastie, Steven D. Penrod & Nancy Pennington, *Inside the Jury* (1983) .....*passim*

Note: James Kachmar, Silencing the Minority: Permitting Nonunanimous Jury Verdicts in Criminal Trials, 28 Pac. L.J. 273 (1997) 16

Gary D. LaFree, *Rape and Criminal Justice: The Social Construction of Sexual Assault*, 155-55, 200-01 (1989) 15

Dolores A. Perez, *et al.*, *Ethnicity of Defendants and Jurors as Influences on Jury Decisions*, 23 J. Applied Soc. Psych., 1249, 1249 (1993) 14

Kim Taylor-Thompson, *Empty Votes In Jury Deliberations*, 113 Harv. L. Rev. 1261 (Apr. 2000) 12, 14, 15

INTEREST OF AMICUS CURIAE [1]

The Charles Hamilton Houston Institute for Race and Justice at Harvard Law School (CHHIRJ) was founded in September 2005 by Charles Ogletree, Jr., Jesse Climenko Professor of Law at Harvard Law School. The Institute continues the unfinished work of Charles Hamilton Houston, one of the Twentieth Century's most talented legal scholars and litigators. Houston helped to engineer the multi-year legal strategy that led to the unanimous decision by this Court in *Brown vs. Board of Education*, 347 U.S. 483 (1954). Sadly, however, he died in 1950, at the age of 54, before he could witness his efforts coming to fruition.

The Charles Hamilton Houston Institute marshals resources to advance Houston's dreams for a more equitable and just society. It brings together students, faculty, practitioners, civil rights and business leaders, community advocates, litigators, and policymakers in a variety of forums, conferences and meetings. The Institute is initially focusing on, among other things, reforming criminal justice policies. *Amicus Curiae* accordingly has a keen interest in having this Court revisit its fractured and historically unsound determination in *Apodaca v. Oregon*, 406 U.S. 404 (1972) and *Johnson v.*

---

[1] Pursuant to Rule 37, both parties received notice of the filing of this brief more than 10 days prior to the due date. A letter of consent from each party accompanies this filing. Pursuant to Rule 36, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person or entity, other than *amicus* and its counsel, made a monetary contribution to the preparation or submission of the brief.

Louisiana, 406 U.S. 366 (1972), that non-unanimous jury verdicts in criminal cases satisfy the Sixth Amendment's jury trial guarantee. As we demonstrate below, non-unanimous jury verdicts in criminal cases create a qualitatively lesser form of justice and hold the potential to marginalize the views of women and people of color as they fulfill their obligation to serve on juries. Given that the analytical basis for these decisions is fundamentally out of step with this Court's modern Sixth Amendment jurisprudence, to delay resolution of the unanimity question raised in the Petition for Certiorari ("Petition") will perpetuate confusion and facilitate injustice in a substantial number of cases in Louisiana and Oregon, the only two states that continue to permit non-unanimous jury verdicts in criminal cases.

SUMMARY OF ARGUMENT

The Court should grant the Petition to decide the important question of whether the Sixth Amendment, as applied to the states by means of the Fourteenth Amendment, requires unanimity in state criminal cases. The Petition focuses largely on demonstrating why the jurisprudential approach utilized in *Apodaca v. Oregon,* 406 U.S. 404 (1972) and *Johnson v. Louisiana,* 406 U.S. 366 (1972), cannot be squared with the legal analysis the Court has relied upon in recent Sixth Amendment cases such as *Crawford v. Washington*, 541 U.S. 36 (2004), *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Pet. at 11-18. Petitioner is correct that the disparity between the approach taken by the Court in the *Apodaca* and *Johnson* decisions—in which a

centuries-old tradition of jury unanimity was swept aside based on judicial estimates about the functional importance of the unanimity requirement—and the approach to the Sixth Amendment taken by the Court in recent cases creates considerable legal uncertainty about the validity of criminal jury verdicts in jurisdictions like Louisiana and Oregon. *Amicus Curiae* fully supports Petitioner's argument that certiorari should be granted to address the continued viability of *Apodaca* and *Johnson* in light of the modern Sixth Amendment approach adopted in cases like *Crawford*, *Gonzalez-Lopez* and *Apprendi*.

Amicus writes separately to emphasize the practical necessity of granting the Petition. This necessity stems from the fact that, setting aside whether the *Apodaca* Court should have engaged in a functional analysis at all, the Court's conclusion with regard to the supposedly minimal importance of the unanimity requirement has now been cast into grave doubt by a generation of empirical research on jury decision making.

According to the Court in *Apodaca*, there is no functional difference between a unanimous jury verdict and a verdict rendered by a vote of 11 to one or 10 to two. *Apodaca*, 406 U.S at 410-11. If this were correct, then the question presented by the Petition would be largely an academic one. However, empirical research conducted over the past 35 years has demonstrated that the unanimity requirement matters significantly because it fundamentally alters the jury dynamic. In short, it is now apparent that there is a real difference between trial by jury in Louisiana and Oregon, and the traditional jury trial

guarantee that existed at the time of the Founding and is still applied elsewhere throughout the Nation.

In particular, as we discuss in detail below, modern empirical research has demonstrated that unanimous juries are more careful, more thorough, and return verdicts that are more in line with what experienced observers of the criminal justice system (generally judges) view to be the correct verdict. Unanimous juries are, in other words, demonstrably more reliable. In addition, and of critical concern to *Amicus Curiae*, the historic unanimity requirement ensures that the viewpoints of *every* juror are carefully considered by fellow jurors, and the resulting unanimous verdict is viewed as more legitimate by all members of the Community.

By contrast, eliminating the traditional unanimity requirement has been shown to produce a situation in which a majority of jurors can marginalize the viewpoints of other jurors by refusing to deliberate further once the majority threshold has been reached. This concern applies to all juries and all jurors, but its effects can be particularly stark when those holding minority viewpoints are historic victims of discrimination, including women, people of color and religious minorities. In such cases, a state law provision permitting non-unanimous criminal verdicts can serve as a *de facto* means of allowing majorities of jurors to prevent minority jurors from jury participation, thereby undermining important Constitutional principles regarding equality in jury service that this Court has taken considerable measures to protect in recent years.

Although the arguments discussed at length in the Petition demonstrate why the question presented is worthy of the Court's attention, the empirical evidence on jury decision making shows why it is critical that this Court confront the question now. The traditional unanimity requirement serves as a basic component of the Sixth Amendment's jury guarantee, which is not currently being afforded to accused persons in Louisiana and Oregon. The Court's corrective intervention is urgently needed.

ARGUMENT

Although systematic empirical research on jury decision making began in 1953 with the initiation of the Chicago Jury Project, *see* Dennis J. Devine *et al.*, *Jury Decision Making: 45 Years of Empirical Research on Deliberating Groups*, 7 Psych., Pub. Pol. & L. 622, 623 (2001), and although the Court, in part, relied on some of the early research in *Apodaca*, 406 U.S. at 411 n.5,[2] most of the empirical research on jury dynamics has occurred in the past 35 years. Indeed, the Court's decisions in *Apodaca* and *Johnson* themselves spawned interest in research on factors affecting jury decision making. *See* Devine *et al.*, *supra*, at 623. The empirical studies conducted since *Apodaca* have cast doubt on the plurality's reasoning with regard to the purported functional

---

[2] The Devine article is "a comprehensive review of the empirical research on jury decision making published between 1955 and 1999." Devine *et al.*, *supra*, at 622. It compiles and organizes data from 206 studies involving actual and mock juries, studying several variables, including rule of decision, and it identifies common themes throughout the studies. *Id.*

equivalence of unanimous and non-unanimous juries.[3]

A. Empirical Research Has Shown That Juries Required to Act Unanimously are More Thorough than Non-Unanimous Juries

Studies comparing the quality of the deliberation of unanimous juries with non-unanimous juries have consistently found that non-unanimous juries are less thorough. *See* Reid Hastie, Steven D. Penrod & Nancy Pennington, *Inside the Jury*, 85 (1983) (finding that the farther the jury gets from a unanimity rule, the fewer key categories of evidence are discussed).[4] In addition, non-unanimous juries

---

[3] *See* Devine *et al.* 7 Psych., Pub. Pol. & L. at 669 (summarizing numerous studies); Reid Hastie, Steven D. Penrod & Nancy Pennington, *Inside the Jury*, 227-233 (1983) (supporting unanimity in criminal trials); Shari Seidman Diamond, Mary B. Rose & Beth Murphy, *Revisiting the Unanimity Requirement: The behavior of the non-unanimous civil jury*, 100 Nw. U. L. Rev. 201, 229-30 (2006) (questioning assumptions in *Apodaca* and related cases and recommending unanimous juries in civil cases).

[4] The study examined the effects of the rule of decision on jury performance using an "experimental method employ[ing] an extremely realistic but highly controlled simulation of the jury decision task." Hastie *et al.*, *supra*, at 13. The study took place in actual courthouses, used existing court personnel, and used the actual jury pool as subjects. *Id.*

The Hastie study asked citizens called for jury duty in Massachusetts trial courts to participate in a mock *voir dire*, after which they were separated into 69 juries. Hastie *et al.*, *supra*, at 60. The jurors then watched a film of a three-hour reenactment of a murder trial. *Id.* at 46. After viewing the reenactment, the jury was instructed by a judge and then asked to retire to deliberate. *Id.* at 50-51. Before the start of

take fewer polls and take less time to reach a verdict than do unanimous juries. Devine *et al.*, *supra*, at 669 (summarizing several studies). *See also* Reid Hastie, Steven D. Penrod & Nancy Pennington, *Inside the Jury*, 76 (1983) (indicating that unanimous juries deliberate longer than non-unanimous juries, and that this result is consistent across all studies examining the decision rule). In addition, non-unanimous juries also tend to cease deliberations when the required quorum is reached. Devine *et al.*, *supra*, at 669.

The idea that the limited deliberations of non-unanimous juries affect deliberation quality is reflected in the way jurors perceive the deliberations. Jurors serving on unanimous juries uniformly report being more satisfied with the deliberations and more confident that the jury came to the right verdict. Devine *et al.*, *supra*, at 669. *See also* Reid Hastie, Steven D. Penrod & Nancy Pennington, *Inside the Jury*, 82 (1983) (indicating that non-unanimous juries have lower rates of satisfaction with the quality of the deliberation and the validity of the verdict as compared with unanimous juries).[5] Non-unanimous juries also report lower ratings of the performance

---

deliberation, the jurors filled out a questionnaire asking which verdict they would choose if they had to decide at that time. *Id.* at 51. After deliberations, the jurors filled out post-deliberation surveys. *Id.* at 52-53. The 69 juries were separated into three groups of 23 juries each, divided by decision rule, with one group having reach a unanimous verdict, one group could reach a verdict if ten out of twelve jurors agreed, and the other group could reach a verdict if eight of twelve agreed. *Id.* at 59-60.

[5] Jurors on-unanimous juries also report having a relatively negative view of their fellow jurors' open-mindedness and persuasiveness as compared with jurors on unanimous juries.

and decision processes of the other jurors. Hastie *et al.*, *supra*, at 76; Shari Seidman Diamond, *et al.*, *supra*, at 205.

Perhaps the most important consideration in examining the effect of the decision rule is whether the rule of decision affects the outcome of deliberations. Studies have shown a limited, but significant, effect of the decision rule on the outcome of jury deliberations, though these effects depend on other factors such as the strength of the evidence. Devine *et al.*, *supra*, at 669. Accordingly, the rule of decision affects the outcome of jury deliberations in close cases—that is, those cases in which the prosecutor's case is neither particularly weak nor strong. *Id.*[6]

Researchers have also studied how the decision rule affects verdict outcome. One element of the deliberative process that has been examined is the amount of deliberation that occurs in twelve-person juries after the majority faction reaches eight jurors. Hastie *et al.*, *supra*, at 95. In 10-2 quorum juries, 10% of the jury's total deliberation time takes place after the majority faction reaches eight jurors, as compared with 20% in unanimous juries. *Id.* at 95-96.[7] There is also evidence that this last 20-30

---

[6] Devine *et al.* also reviewed studies finding that whether the jury was unanimous had "little or no impact" on jury deliberations, but those studies had "methodological weaknesses, such as little or no variance in jury verdicts, severe deliberation time limits, and small samples." Devine *et al.*, *supra*, at 669.

[7] Non-unanimous juries also reach the eight-juror majority faster than do unanimous juries. Hastie *et al.*, *supra*, at 113.

minutes of deliberation can be outcome determinative. In almost a third (seven) of the unanimous juries monitored in the Hastie *et al.* study, the verdict initially favored by the eight-juror majority was not the verdict delivered by the jury. *Id.* at 96.[8] In addition, almost 30% of the requests for information from the trial judge, a quarter of the corrections of the evidentiary or legal errors made during deliberation, and over one-third of the discussions of the reasonable doubt standard occurred during the period after an initial eight-juror majority had been established. *Id.*

Though the same number of juries under each of the three decision rules delivered the "correct" verdict of second-degree murder, *see* Hastie *et al.*, *supra*, at 59-60, the study yielded two significant results –a statistically significant increase in the number of hung juries under the unanimity rule, and a statistically significant number of "incorrect" first-degree murder verdicts under the 10-2 majority rule. *Id.* at 60.[9] The research suggests, then, that this result is somewhat normative; the hung juries under the unanimity rule seem to prevent the "wrong"

---

[8] Three juries hung, and of the remaining four, two switched from second-degree murder to manslaughter and two switched, respectively, from first-degree murder and manslaughter to second-degree murder. *Id.* at 96.

[9] Though picking the "right" verdict is impossible, second-degree murder was considered the "right" verdict because it was the verdict delivered at the original trial, and legal experts who viewed the reenactment largely agreed that second-degree murder was the proper verdict. Hastie *et al.*, *supra*, at 62. The three hung juries under the unanimity rule would have also delivered the "wrong" verdict if the majority faction had prevailed. Hastie *et al.*, *supra*, at 63.

result from occurring. *Id.* Also, when unanimous juries did come to the "wrong" result their verdicts were often less harsh than those delivered by non-unanimous juries which tended to deliver excessively harsh verdicts. *See id.* at 102.

Another factor that has been studied is the time taken between votes as a function of the decision rule. Unanimous juries took more time to deliberate between votes than did non-unanimous juries. Hastie *et al.*, *supra*, at 90. This greater length of time between votes is associated with the "integrative evidence-driven" deliberation style, while the shorter length of time between votes in the non-unanimous juries is attributed to the "discounting verdict-driven deliberation style." Hastie *et al.*, *supra*, at 90. *Accord* Shari Seidman Diamond, *et al.*, *supra*, at 208. The evidence-driven deliberation style is adopted most often by juries in cases where the ultimate verdict was decided more by the deliberative process than by the positions of the jurors before deliberations began. Devine, *et al. supra*, at 701.

The decision rule has a demonstrated effect on the quality of deliberations and the way deliberations are perceived. Perhaps most importantly, the decision rule appears to have an effect on the accuracy of the delivered verdict. The research suggests that unanimous juries provide a normative advantage over non-unanimous juries.

B. Valid Minority Opinions Can Be Easily Marginalized when Unanimity is not Required

The *Johnson* majority concluded that changing the rule of decision would have little or no effect on

the consideration given to the viewpoints of the minority jurors in a quorum jury and that the strength of the deliberations would not be significantly diluted. *Johnson*, 406 U.S. at 361. The research contradicts this conclusion. Instead, the research indicates that eliminating unanimity reduces both the quality of juror deliberations and juror satisfaction with those deliberations. The research also indicates that while jurors extensively debate the issues in both unanimous and quorum juries, the jurors' knowledge that they do not have to resolve all disagreement to reach a verdict in quorum juries often leads to "dismissive" treatment of minority jurors whose votes are not needed to reach a verdict. Shari Seidman Diamond, *et al.*, *supra*, at 205. Indeed, one study found that juries with eventual holdouts were twice as likely to mention the quorum rule early in deliberations as were juries that ended up delivering a unanimous verdict, and in 40% of the juries studied, the jurors highlighted the quorum requirement before or during the first vote. Shari Seidman Diamond, *et al.*, *supra*, at 214.[10]

---

[10] The Seidman Diamond study reviewed videos of the deliberations of 50 actual civil juries in Arizona. Shari Seidman Diamond, *et al.*, *supra*, at 210-12. The 50 case sample contained 26 motor vehicle cases, 17 non-motor vehicle tort cases, 4 medical malpractice cases, and 3 contract cases. *Id.* at 211. Arizona civil juries consist of eight jurors, six of whom must agree in order to reach a verdict. *Id.* at 205. Thirty-three of the 50 juries reached unanimous verdicts on all claims, one case resulted in a hung jury, and the other 16 juries reached verdicts with at least one holdout. *Id.* at 212. Five of the 16 cases ended with a single holdout juror, while 11 of the cases either had two holdouts for one position (8), or two holdouts, each of whom had a different position (3).

There is evidence to suggest that when deliberations are cut off prematurely based on majority reliance on the quorum rule the reliability of the verdict suffers. In several cases, the result favored by the minority jurors was the same as the result favored by the judges in those cases. *See* Shari Seidman Diamond, *et al.*, *supra*, at 222.[11] Evidence also suggests that unanimity is central to the legitimacy of jury verdicts. *See* Shari Seidman Diamond, *et al.*, *supra*, at 227 (citing research indicating that "community residents viewed unanimous procedures for arriving at jury verdicts in criminal cases as more accurate and fairer than majority procedures").

In addition to raising concerns about the accuracy and perceived legitimacy of verdicts reached by non-unanimous juries, such juries also raise concerns that the views of racial and ethnic minorities and women may be marginalized. Though the Court has proscribed exclusion of people of color, *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880), and women, *Taylor v. Louisiana*, 419 U.S. 522, 537 (1975), from juries, research indicates that a quorum decision rule may contribute to a *de facto* exclusion of their viewpoints. Kim Taylor-Thompson, *Empty Votes In Jury Deliberations*, 113 Harv. L. Rev. 1261, 1264 (Apr. 2000). The data indicate that women and minorities are underrepresented on juries. Taylor-Thompson, *supra*, at 1276-77, 1298 (citing evidence that women and people of color are underrepresented

---

[11] In the study, the judges presiding over the 50 reviewed cases filled out questionnaires in which they were asked to reveal what they thought to be the proper verdict after having heard the evidence. Shari Seidman Diamond, *et al.*, *supra*, at 222.

in the venire and on juries, and that prosecutors disproportionately use peremptory strikes on people of color, despite the prohibitions of *Batson v. Kentucky*, 476 U.S. 79 (1986)). It also cannot be ignored that the Louisiana Constitutional provision permitting non-unanimous juries was adopted as part of the 1898 Louisiana Constitutional convention—the same convention that adopted various Jim Crow provisions specifically intended to limit African American participation in the democratic process and to "perpetuate the supremacy of the Anglo-Saxon race in Louisiana." *See* Constitutional Convention of the State of Louisiana, Official Journal of the Proceedings of the Constitutional Convention of the State of Louisiana 380-81 (H.J. Hearsey, 1898).[12]

While the underrepresentation of women and people of color on juries is no guarantee that they will end up in the minority faction of a quorum jury, *see*

---

[12] When discussing the provisions adopted to prevent African American suffrage, one delegate to the convention stated as follows:

> [T]he Supreme Court of the United States in the Wilson case, referring to that, said that they had swept the field of expedients, but they were permissible expedients, and that is what we have done in order to keep the negro from exercising the suffrage. What care I whether the test we have put be a new one or an old one? What care I whether it be more or less ridiculous or not? Doesn't it meet the case? Doesn't it let the white man vote, and doesn't it stop the negro from voting, and isn't that what we came here for? (Applause)

Constitutional Convention of the State of Louisiana, *supra*, at 380.

Hastie *et al.*, *supra*, at 149; Shari Seidman Diamond, *et al.*, *supra*, at 220 (finding that there are no personal demographic characteristics that differentiate holdouts from the other jurors), there are indications in the data that suggest that *de facto* exclusion of underrepresented groups is an important concern. For example, race and gender are negatively correlated with juror persuasiveness and deliberation performance. *See* Hastie *et al.*, *supra*, at 149 (finding that to the extent the juror has characteristics or experiences that are negatively linked to deliberation performance and juror persuasiveness, the more likely the juror is to be a holdout). *See also* Taylor-Thompson, *supra*, at1298-99 (citing studies observing that women speak less than do men during deliberations, and that men often interrupted the women and ignored their arguments). These factors indicate an increased likelihood that women and people of color may end up being outvoted by the majority on a non-unanimous jury.

Any marginalization of women and people of color from juries created by a quorum rule of decision may have collateral consequences for racial and ethnic minority defendants and crime victims. For example, a 1996 study found that when the prosecutor's evidence was weak, majority white juries were more likely to convict black defendants than were majority black juries. Devine *et al.*, *supra*, at 673-74. In addition, the verdicts of the majority white juries were harsher than those of the majority black juries. *Id.* Other studies have found that majority white juries are similarly punitive when the defendant is Latino. Taylor-Thompson, *supra*, at 1293 (citing Dolores A. Perez, *et al.*, *Ethnicity of Defendants and Jurors as Influences on Jury*

Decisions, 23 J. Applied Soc. Psych., 1249, 1249 (1993)). In addition, interviews conducted with 360 actual jurors for rape trials in Indianapolis revealed that the mostly middle-class white jurors tended to disbelieve African American rape complainants. Taylor-Thompson, *supra*, at 1294 (citing Gary D. LaFree, *Rape and Criminal Justice: The Social Construction of Sexual Assault*, 155-55, 200-01 (1989).

In *Ballew v. Georgia*, 435 U.S. 223, 236-37 (1978), the Court stated that "meaningful community participation cannot be attained with the exclusion of minorities or other identifiable groups from jury service. 'It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community.'" *Id.* (citing *Smith v. Texas*, 311 U.S. 128, 130 (1940)). In addition, part of the Court's rationale in examining the role of jury size on verdict outcome was to minimize "imbalance[s] to the detriment of one side, the defense." *Ballew v. Georgia*, 435 U.S. 223, 236 (1978). The Court has also made significant efforts in recent years to ensure that jurors are not excluded from jury participation on the basis of their race or gender. *J.E.B. v. Ala. ex rel. T.B.*, 511 U.S. 127 (1994); *Miller-El v. Dretke*, 544 U.S. 660 (2005) and *Snyder v. La.*, 128 S. Ct. 1203 (2008). The evidence suggests that to the extent the views of women and people of color are marginalized within them, non-unanimous juries undermine these important constitutional principles.

C. The Myth of the Eccentric Holdout Juror

The one principal argument made in favor of dispensing with the traditional unanimity requirement is that the unanimity rule allows an eccentric holdout juror to subvert the will of a principled majority. *See* Shari Seidman Diamond, Mary B. Rose & Beth Murphy, *Revisiting the Unanimity Requirement: The behavior of the non-unanimous civil jury*, 100 Nw. U. L. Rev. 201, 204 (2006) (citing critics of unanimity who claim that quorum juries protect the jury from the "obstinacy of the erratic or otherwise unreasonable holdout juror"); Note: James Kachmar, Silencing the Minority: Permitting Nonunanimous Jury Verdicts in Criminal Trials, 28 Pac. L. J. 273, 299 (1997) (citing cases in which a single holdout juror irrationally hung a criminal jury). The research shows that this concern is unfounded. Shari Seidman Diamond, *et al.*, *supra*, at 205 (finding no evidence that outvoted holdouts are irrational or eccentric in ways that justify isolating them or failing to seriously consider their views).

To begin with, juries rarely hang. Numerous studies indicate that 90% of the time, the jury's final verdict was that favored by the majority of the jury at the outset of deliberation. Devine *et al.*, supra, at 690. This result appears to be linked to the size of the majority at the beginning of deliberations—majorities of two-thirds or more usually prevail, while weak majorities are more likely to hang (or acquit, presuming that the original majority was to convict). *Id.*

In addition, initial two-thirds majorities favoring conviction succeeded in obtaining a guilty verdict 67% of the time, while two-thirds majorities favoring acquittal won 94% of the time. Devine *et al.*, *supra*, at 691. The largest increase in success rate for conviction majorities occurs, in 12-person juries, between 10-2 and 11-1, whereas the success rate for acquittal majorities increases the most between 8-4 and 9-3. Devine *et al.*, *supra*, at 692.[13] The data indicate that if seven or fewer jurors favor conviction at the beginning of deliberation, the jury will probably acquit. If ten or more jurors favor conviction, the jury will probably convict. At eight or nine jurors supporting conviction, the outcome becomes more difficult to predict. *Id.* In any event, it is clear that not only are hung juries rare, the 11-1 hung jury is even rarer. Indeed, contrary to the common stereotype of the jury stymied by a lone holdout, studies have shown that juries are usually hung either by two large factions or several smaller factions. Hastie *et al.*, supra, at 166. *See also* Shari Seidman Diamond, *et al.*, *supra*, at 207 (citing findings from the National Center of State Courts finding that 58% of hung juries in criminal cases ended with at least three holdouts).

In addition to hung juries being unlikely, the research shows that the fears of the irrational holdout juror are unfounded. Indeed, there are no personal demographic characteristics that

---

[13] If hung juries are factored out of the analysis, the greatest increase in success rate for conviction majorities is between 8-4 and 9-3; for acquittal, a majority is not even necessary, as the greatest increase in success rate occurs when the acquittal faction is greater than four. Devine *et al.*, *supra*, at 692.

differentiate holdouts from the other jurors. Hastie *et al.*, *supra*, at 149; Shari Seidman Diamond, *et al.*, *supra*, at 220. Further, the holdouts viewed the judge's instructions in much the same way as the majority jurors, and their recall of the testimony and of the elements of the offenses did not differ from that of the majority. Hastie *et al.*, *supra*, at 149. *See also* Shari Seidman Diamond, *et al.*, *supra*, at 220 (finding that holdouts and majority jurors largely agreed about the content of the evidence).

Other than extreme disagreement with the majority's choice of verdict, the main difference between the holdouts and the majority was that the holdouts had a significantly lower perception of the seriousness and thoroughness of the deliberations. Hastie *et al.*, *supra*, at 149; Shari Seidman Diamond, *et al.*, *supra*, at 225. This negative perception appears to be linked to deliberation performance, which is, in turn, linked to education, occupation, income, gender, and juror persuasiveness. Hastie *et al.*, *supra*, at 149. The more a juror's characteristics or experiences are negatively linked to deliberation performance and juror persuasiveness, the more likely the juror is to be a holdout. *See id.*[14]

To summarize, a perceived cost of unanimity is the slight increase in hung juries that results from the rule. The data ameliorate this concern. In contrast, one additional decision rule cost the data support is the cost associated with the marginalization of the minority voice attendant to the

---

[14] Even when there was a lone holdout, that person was likely to be a person who refused to participate in the deliberations. Hastie *et al.*, *supra*, at 166.

quorum rule. This problem becomes even more acute when the marginalized minority is composed of individuals from underrepresented groups.

D. The Court's Decisions In Apodaca and Johnson Undermine A Critical Portion of the Jury Trial Guarantee And Make This Court's Intervention Imperative

There can be no serious question that when the Framers adopted the jury trial guarantee, they did so with a *unanimous* jury in mind. At the time when *Apodaca* and *Johnson* were decided, the importance of this time-honored procedural mechanism may not have been apparent to the Court. In light of a generation of empirical research, however, the importance of the unanimity requirement is now undeniable. Unanimous juries protect the quality and integrity of the verdict, ensure full participation of all jurors, and prevent marginalization of the views of underrepresented groups. Non-unanimous juries, as a practical matter, constitute a very different deliberative body than the one the Framers of the Sixth Amendment had in mind. *Amicus Curiae* respectfully requests that the Court grant the Petition in order to address whether the *Apodaca* and *Johnson* Courts properly interpreted the Sixth Amendment jury trial guarantee to permit non-unanimous juries, unknown at the time of the Founding.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

TIMOTHY P. O'TOOLE
Counsel of Record
KEVIN G. MOSLEY
MILLER & CHEVALIER CHARTERED
655 Fifteenth St., N.W., Suite 900
Washington, D.C. 20005
(202) 626-5800

July 7, 2008